Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1940

In the

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE FUDGE, by her parents and next friends, SHARON FUDGE and GEORGE FUDGE; and SHARON FUDGE and GEORGE FUDGE; JENNIFER ANN MERRITT, by her parent and next friend, SANDRA M. MERRITT; and SANDRA M. MERRITT; TINA MARIE OLIVER, by her parents and next friends, ROGER OLIVER and CHRISTINE OLIVER; and RENEE VINCENT, by her parent and next friend ROSE ANN VINCENT; and ROSE ANN VINCENT,

Petitioners,

vs.

PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a publisher forfeit his First Amendment right to comment upon a newsworthy item because some of the subjects of the item happen to be children?

2. Can petitioners state a cause of action against a magazine and its publisher solely because they are dissatisfied with the sexual nature of other parts of the magazine totally unrelated to the news item in which they appear?

3. Can petitioners state claims for libel, "false light" invasion of privacy and intentional infliction of emotional distress against a magazine which merely reprints a newsworthy article previously appearing in the national news media?

4. Does the oxymoron "Little Amazons" used in the context of a newsworthy article to describe the aggressive behavior of the female minor petitioners constitute a protected expression of opinion under the facts and circumstances of this case?

5. Should this Court review petitioners' claims of invasion of privacy and intentional infliction of emotional distress when both claims were dismissed because they failed to satisfy the requirements of state law?

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PENTHOUSE INTERNATIONAL, LTD. and BOB GUCCIONE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Penthouse International, Ltd. and Bob Guccione ("Penthouse") respectfully request that this Court deny the petition for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the First Circuit entered on March 1, 1988.

Statement of the Case

The petition filed in this case raises no issue worthy of review by this Court. Petitioners admit that they became embroiled in a controversy created by their school principal's decision to segregate the sexes during recess periods due to the aggressive behavior displayed by the girls toward the boys. Petitioners volunteered interviews to the

press and posed for a photograph showing them giving the "thumbs-down" gesture to express their dissatisfaction with the school policy.

The articles about this controversy which first appeared in the local Rhode Island newspapers spawned a flurry of national media attention, and the story was thereafter carried on the national wire services and on national radio and television stations. Included in the national dissemination of this news story were interviews with some of the petitioners and the photograph described above.

In the "Hard Times" section of the April 1986 issue of Penthouse Magazine, Penthouse reproduced the photograph and story about petitioner's school controversy that appeared in a local Oregon newspaper and was sent to Penthouse by an Oregon reader. Penthouse only added the headline "Little Amazons Attack Boys" and a brief editorial comment (the entire text of the item as it appeared in Penthouse Magazine is quoted at p. 5 of the petition).

The monthly "Hard Times" section of Penthouse Magazine appears in a newspaper format and describes itself as a "compendium" of items "culled from the nation's press." It thus signals the reader that it consists of reprints from other publications, each of which is attributed to a source, and at the end of the column contains an "Editor's Note" which solicits readers to send clippings to Penthouse's office in New York.

Petitioners never sued the Providence Journal Bulletin, CBS, NBC, the AP or the UPI, or any of the other numerous television and radio stations which reported on the school controversy. Nor did petitioners lodge any protest, cry of outrage or complaint about the publicity and media attention they attracted or about the wide dissemination of their story.

The only complaint which resulted was that filed by petitioners against Penthouse. Seeking to exploit the sexual

content of other, unrelated portions of the publication, petitioners urged that they were emotionally distressed and placed in a "false light" by their unauthorized appearance in Penthouse Magazine. Petitioners' complaint necessarily failed, however, not only because of the constitutional protection accorded to expressions of opinion, but because of Penthouse's fundamental entitlement to report and comment on newsworthy matters, guaranteed by the same First Amendment rights enjoyed by any other publication. Penthouse does not forfeit its constitutional freedoms because of the nature of its magazine, nor because the subjects of news happen to be children.

Moreover, petitioners' argument that the sexual nature of the magazine must be considered is cast only in the context of the "false light" and outrage claims. But both of these claims were decided by applying state law, and the Court of Appeals expressly stated that it need not reach the constitutional defenses applicable to those claims. 840 F.2d at 1020 n. 5 and 1021 n. 6. Thus, as to these issues, this is not a case of a constitutional limitation superimposed upon state law, but an instance of petitioners' failure to meet the requirements of state law in order to sustain claims for privacy and outrage.

The only constitutional issue addressed by the Court of Appeals was the opinion doctrine as it applied to petitioners' allegations of libel. Yet petitioners' provide no reason for reviewing the unexceptional application of that doctrine which required dismissal of their defamation claim.

REASONS FOR DENYING THE WRIT

I.

There is no conflict in the circuits concerning the prohibition against considering unrelated parts of a magazine in determining whether petitioners have stated a claim for "false light" invasion of privacy or outrage.

Petitioners urge that the sexual content of Penthouse Magazine, albeit unrelated to the news items in question, is relevant to their contention that they have been placed in a "false light" and have suffered emotional distress. As noted, however, the Court of Appeals did not reach the constitutional defenses applicable to these claims, but dismissed each solely as a matter of state law.

Addressing the "false light" privacy claim, the Court of Appeals construed the Rhode Island privacy statute, R.I. Gen. Law §9-1-28.1(a)(4), to conclude that petitioners failed to demonstrate that the news item was capable of implying an objectionable association. 840 F.2d at 1017-20. Addressing the emotional distress claim under Rhode Island common law, the Court of Appeals concluded that the mere republication of the photograph and news item about petitioners was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. 840 F.2d at 1020-21. Petitioners' failure to satisfy state standards for liability accordingly presents no question for this Court to review.

Nevertheless, it should be noted that petitioners' effort to create a conflict between the First Circuit's opinion below and the Fifth Circuit's decision in *Braun v. Flynt*, 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984), is entirely misplaced. In *Braun*, an editor of *Chic* Magazine obtained a picture by the false pretense of representing his

publication as a fashion and travel magazine rather than a sexually explicit men's magazine. 726 F.2d at 247. Moreover, the court in *Braun* held that plaintiff had established a privacy claim under Texas law which did not infringe constitutional protections. In this case, by contrast, petitioners have failed to state a claim under Rhode Island's privacy statute, so that the constitutional issue was never even reached.

Interpreting Texas law, the court in *Braun* concluded that "the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied Mrs. Braun had consented to having her picture in *Chic*." *Id.* at 254 n. 11. No such implication of endorsement was found in this case due to the nature of the "Hard Times" column of Penthouse Magazine. As the Court of Appeals observed, that column was described as a compendium of items "culled from the nation's press," the article itself was "clearly labeled as having been taken from a newspaper and submitted by an Oregon reader," and "*Penthouse's* editor clearly distinguished between his own comment upon the story and the story itself." 840 F.2d at 1019.

Petitioners urge that a conflict exists between the First and Fifth Circuits because in *Braun* the entire magazine was introduced into evidence. However, no conflict could possibly exist because the First Circuit in this case was construing the Rhode Island privacy statute and the Fifth Circuit in the *Braun* case was interpreting the Texas common law right of privacy. Moreover, petitioners notably omit mentioning the more recent Fifth Circuit case of *Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1295 (1987), which categorically rejects petitioners' view of *Braun*, explaining that "our inquiry surrounding the context within which the photograph there appeared was focused on the 'Chic Thrills' section of *Chic* in which it was

published. We did not evaluate the entire magazine." 799 F.2d 16 1006.*

The Fifth Circuit in *Faloona* expressly referred to the district court's similar distinction of *Braun*, followed by its explanation of the fundamental proposition that "there is no right of privacy merely because a person's photograph or name appears in a magazine whose content is objectionable to that person." 607 F. Supp. 1341, 1356 n. 48 (N.D. Tex. 1985). Despite petitioners' dissatisfaction with Penthouse Magazine, their protestations cannot overcome the fundamental First Amendment right of all publications to equally enjoy the protection of free speech. *Winters v. New York*, 333 U.S. 507, 510 (1947). Accord, *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33-34 (1st Cir. 1987); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 138 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Pring v. Penthouse International, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

II.

The "tender years" of the petitioners does not require a magazine to forfeit its First Amendment right to comment upon matters of public interest.

Petitioners offer the unprecedented and unsupported argument that a parent's right to protect the interests of his children somehow creates a cause of action not heretofore recognized by state law. Measured by the authorities cited, petitioners have confused constitutional restrictions upon governmental conduct with the First Amendment freedoms available to all citizens.

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* Perhaps this explains why petitioners never annexed either the article in question or Penthouse's "Hard Times" column to their complaint, and objected to its consideration by the Court of Appeals. There is nothing in the article or column of a sexually explicit nature.

Thus, a housing ordinance was declared unconstitutional in *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977), because it amounted to intrusive regulation of the family. This case, however, does not implicate state action in any way, so that the due process clause cannot be used to challenge Penthouse's constitutional right to publish a legitimate news item about petitioners.

Likewise, the statutory restriction on the sale of adult magazines to minors reviewed in *Ginsberg v. New York*, 390 U.S. 629 (1969), does not raise any issue relevant to this case. The argument at pp. 15-16 of the petition represents nothing more than a plea to the Rhode Island Legislature to enact a statute that would afford them a remedy under the facts of this case—but such an argument is not properly made to this Court. In any event, such a statute would be unconstitutional, for the answer to the rhetorical question raised at p. 16 of the petition (what right does Penthouse have to publish a story about petitioners?) is the same right enjoyed by the local Rhode Island newspapers, the AP, UPI and news media across the country to cover a story about newsworthy subjects.

In *Faloona v. Hustler Magazine, Inc., supra*, the plaintiffs were only seven and five years of age when their photographs were taken. Yet neither the district court nor the Fifth Circuit suggested that a different analysis should apply to the magazine's constitutional rights because the plaintiffs were young children. That case was dismissed even though the plaintiffs were neither public figures nor participants in any public controversy.

That petitioners may have feelings of ourage and humiliation at seeing their story in Penthouse Magazine does not confer upon them a cause of action which would render Penthouse liable under any theory of state law. Having lost on their claims of privacy and outrage on state law grounds, their petition to this Court is unfounded.

III.

The dismissal of petitioners' claim for intentional infliction of emotional distress was not on the basis of constitutional considerations, but solely on the basis of state law.

The petitioners call upon this Court to decide an issue not present in this case—whether the recent decision in *Hustler Magazine v. Falwell,* 108 S.Ct. 876 (1988), applies to private figures.*

The *Falwell* decision imposed a constitutional limitation upon the ability of public figures to recover for the tort of intentional infliction of emotional distress. In that case, Falwell had recovered damages under state law which were ultimately held to be proscribed by constitutional principles. On the other hand, here, petitioners' claim was rejected under state law, with the Court of Appeals holding that under Rhode Island law the "reprinting of relatively innocuous news items or photographs that have already appeared in other media simply cannot be characterized as exceeding all possible bounds of decency, atrocious or utterly intolerable in a civilized community." 840 F.2d at 1021. For that reason, the constitutional defenses raised by Penthouse were never reached by the First Circuit. *Id.* at 1021 n. 6. Indeed, the First Circuit did not require petitioners to prove a false statement of fact or actual malice to support their outrage claim (as this Court in *Falwell* held was required of public figures), but instead found that the facts pleaded did not meet applicable state law standards.

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* Petitioners' own description of their voluntary participation in the debate concerning the segregation of sexes during recess periods at their elementary school, and their efforts to influence the outcome of that controversy by expressing their dissatisfaction with school policy, fits squarely within the classic formulation of a limited purpose public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974).

Ironically, the *only* issues raised in the petition relate to claims of "false light" privacy and outrage—both of which were dismissed as a matter of state law without reaching the constitutional questions. The *only* constitutional issue decided by the Court of Appeals was its application of the opinion doctrine to the libel claim, 840 F.2d 1015-17, yet the petition raises no direct challenge to that determination.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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June 24, 1988